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No. 854

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIS SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 120-121) is reported at 252 F. 2d 120.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958 (R. 122), and a petition for rehearing was denied on March 27, 1958 (R. 127). The petition for a writ of certiorari was filed on April 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge's comments after denying petitioner's motion for a list of Government witnesses were improper, and whether petitioner's motion to supplement the record in relation to this issue should be granted.

2. Whether the Court of Appeals, before which the issue of search and seizure was raised for the first time, properly held that the issue had been waived.

3. Whether the trial judge's instruction on possession of marihuana was correct.

STATEMENT

An indictment filed December 18, 1956, in the District Court for the Southern District of Florida charged petitioner with wrongfully obtaining marihuana without having paid the transfer tax, in violation of 26 U.S.C. (Supp. V) 4744(a) (R. 1-2). Petitioner was found guilty as charged by a jury and sentenced to five years' imprisonment (R. 3-4). On appeal, his conviction was affirmed *per curiam*.

1. On December 1, 1956, patrolman Rudolph Brown, of the Miami, Florida, police department, was on duty directing traffic during a parade. He happened to see Harold Pieze (who was known to Brown in connection with narcotics, among other things (R. 24)) and a person later identified as William Hadley seated in an automobile which was standing in a line of traffic about 100 feet from Brown's intersection (R. 16-18). Pieze was talking to petitioner, who was standing next to the car (R. 16). When Brown permitted traffic on this street to proceed, the automobile driven by Pieze failed to move forward even after a

special signal (R. 17-18). The officer became suspicious and stopped the car when it finally reached the intersection (R. 18). After ordering Pieze and Hadley out of the car and ascertaining that " * * * they didn't have anything on them," Brown looked in the car (R. 18). Either on or under the front seat the officer found a sack containing marihuana cigarettes (R. 13, 18-19). There were no narcotic order forms in the car, and Pieze and Hadley did not have any on their persons (R. 22).

Harold Pieze testified that, shortly before his arrest, he and Hadley had been invited into petitioner's car by petitioner; that petitioner owed Pieze ten dollars and Pieze wanted his money, but petitioner did not have that sum with him at the time (R. 30-31); that, as they approached officer Brown's intersection in heavy traffic, petitioner asked Pieze to drive petitioner's car around the corner and wait for him, saying he would come back and pay Pieze the ten dollars; that petitioner then got out of the car (R. 31); that Pieze moved over into the driver's seat, but stalled the motor and officer Brown walked up soon thereafter (R. 32); and that neither Pieze nor Hadley had a package when they got into the car (R. 46). Pieze's testimony was corroborated by Hadley (R. 42-46).

After officer Brown arrested Pieze and Hadley, he took them to the precinct station (R. 21). A few hours later federal agent Rudd was called into the case (R. 27). Rudd, Emsley (a Miami detective (R. 25-26)), and Bellinger (a state narcotics officer (R. 38)), went to the Miami Police Auto Pound and searched petitioner's automobile thoroughly. They found a small amount of marihuana seeds and leaves embedded in the floor carpet (R. 58).

Petitioner was arrested on December 6, 1956, by agent Rudd (R. 60). He was unable to produce the documents necessary to show payment of the transfer tax (R. 59). While being fingerprinted, he admitted that he had not returned to his car because he was afraid of being arrested, and that he had not attempted to retrieve his automobile (R. 60-61).[1]

2. When the case was called for trial, Mr. O'Quin, one of petitioner's two defense counsel, requested a list of the Government witnesses (R. 8). The District Court denied the motion and the following exchange took place (R. 9-10):

> The Court: It will be denied.
>
> You know the Federal Rules. The list of Government witnesses are not furnished in criminal cases for very cogent reasons, in my opinion. Some of them would probably disappear during the trial.
>
> Mr. O'Quin: I don't see how the Court—
>
> The Court: Here we have a narcotic case. Grave penalties are involved. There is a great temptation to interfere with witnesses.
>
> Mr. O'Quin: The Government has ways of punishing them.
>
> The Court: That doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be glad to interfere seriously with witnesses. I know you wouldn't do it.

---

[1] Petitioner testified that he had loaned his automobile to Pieze because Pieze was to distribute advertising handbills for him (R. 68, 70); that he did not know there was marihuana in his car (R. 74) and that he did not learn of the arrests until later that night (R. 72). However, petitioner does not here contest the sufficiency of the evidence.

> It has been long settled in Federal cases that a list of witnesses is not furnished except in civil cases.
>
> Mr. O'Quin: All right, your Honor. We are ready for trial. We take exception to the Court's ruling.

Then a jury was sworn and trial proceeded (R. 11).

The Court of Appeals held that there was no showing that the judge's ruling was made in the presence of, or was audible to, anyone who later became a juror. Petitioner petitioned for a rehearing, offering to show that the jurors were present and heard the trial judge's remarks, but rehearing was denied. Petitioner has, by motion, asked this Court to consider photographs of the courtroom to show its small size, and the affidavits of five jurors to show that they heard the trial judge's conversation and ruling (although only three remembered the conversation as it appears in the record).

3. After both parties had rested, the District Court, at the request of defense counsel, instructed the jury, *inter alia*, on the subject of possession, as follows (R. 102-103):

> Possession generally means that authority over an object which is generally exercised by the owner of an object, or it may mean the authority to dispose of an object.
>
> In other words, you can either possess it as an owner or you might have the authority to make disposition of property. In either event that would be possession as generally recognized by the law.

Defense counsel expressly said he had nothing further to offer and did not wish to discuss or object to the instructions (R. 163).

ARGUMENT

1. The juror affidavits were not made part of the record below and should not be considered here. See *Lawn* v. *United States*, 355 U.S. 339, 354 ("we must look only to the certified record in deciding questions presented"); see also *Edwards* v. *United States*, 312 U.S. 473, 481-482. But, even if the affidavits may be considered, they fail to show that the trial court erred or that petitioner was prejudiced.

The judge's ruling denying the request for a list of the prospective Government witnesses was clearly right, since this was a non-capital case. *United States* v. *Brandt*, 139 F. Supp. 367, 372 (N.D. Ohio); *United States* v. *Brennan*, 134 F. Supp. 42, 53 (D. Minn.); *United States* v. *Wilson et al.*, 72 F. Supp. 812, 818 (W.D. Mo.), affirmed *sub nom. Klein* v. *United States*, 176 F. 2d 184 (C.A. 8), certiorari denied, 338 U.S. 870.[2]

The judge then went on to say that the reason for the rule was to prevent tampering with witnesses, but expressly said that he knew that defense counsel would not do such a thing. He thus could not have left the impression that he was suggesting that petitioner

[2] This question, among many others, was present in *Calvaresi* v. *United States*, 216 F. 2d 891, 899-900 (C.A. 10), reversed *per curiam*, 348 U.S. 961. However, it was not raised in this Court and hence could not have been the basis for reversal (see Government's Brief, p. 23, Nos. 538 and 548, 1954 Term). *Jencks* v. *United States*, 353 U.S. 657, assumes that pretrial statements of a witness need not be produced until after the witness takes the stand, and thus it is not authority for the proposition that the names of prospective witnesses must be disclosed prior to trial. See also 18 U.S.C. (Supp. V) 3500.

might tamper with the Government witnesses if he knew their identity in advance. This case does not go as far as *Beard et al.* v. *United States*, 82 F. 2d 837, 844 (C.A. D.C.), certiorari denied, 298 U.S. 655, where the judge expressly told the jurors that they were being kept together during trial because defendants had "a large number of friends who may also undertake to talk to the jury."

2. The important search in the case—that by officer Brown which resulted in the seizure of the marihuana cigarettes—was not a federal undertaking. Officer Brown, a local officer, made the search on his own initiative. Agent Rudd was not notified until after Pieze and Hadley had been arrested and the first search of the automobile completed.

The federal courts have been operating under the doctrine that evidence obtained solely by state agents in an illegal search may be admitted in federal court, despite the Fourth Amendment, ever since the rule of suppression was first formulated in *Weeks* v. *United States*, 232 U.S. 383. See also *Byars* v. *United States*, 273 U.S. 28, 33; *Lustig* v. *United States*, 338 U.S. 74. This Court has recently declined an opportunity to reconsider this principle. *Gaitan* v. *United States*, 252 F. 2d 256 (C.A. 10), certiorari denied, April 28, 1958, No. 843, this Term. See also *Collins* v. *United States*, 230 F. 2d 424, 425 (C.A. 6); *United States* v. *White*, 228 F. 2d 832, 835 (C.A. 7); *Jones* v. *United States*, 217 F. 2d 381 (C.A. 8); *United States* v. *Stirsman*, 212 F. 2d 900, 905 (C.A. 7); *Fredericks* v. *United States*, 208 F. 2d 712, 714 (C.A. 5), certiorari denied, 347 U.S. 1019; *Parker* v. *United States*, 183 F. 2d 268, 270 (C.A. 9); *Losicaw* v. *United States*, 177 F. 2d 919, 923 (C.A. 8).

In any event, although petitioner asserted before the Court of Appeals (Pet. App. 2) and claims here that the search of his automobile was unlawful, he never moved—before, during, or after trial—for suppression of the marihuana found therein. He himself testified that he knew of the arrests the night of the day they took place, and that the police "found the boys with some marijuana in the car" (R. 72). But no explanation of the failure to make a proper motion or objection has been offered.

It is a permissible inference that the failure to move to suppress was deliberate strategy on the part of petitioner, for his whole theory of defense was that he had never placed any marihuana in the car, and that Pieze or Hadley, both being narcotics users (R. 75), must have done so. In any event, no adequate reason, or even any reason at all, for the failure to act has been offered, and petitioner has waived any right to the suppression of evidence which he might have had. His present objection to the seizure is plainly an afterthought. Rule 41(e), F. R. Crim. P.; *Segurola* v. *United States*, 275 U.S. 106, 111-112; *United States* v. *Sansone*, 231 F. 2d 887, 892 (C.A. 2), certiorari denied, 351 U.S. 987; *United States* v. *Salli et al.*, 115 F. 2d 292, 293 (C.A. 2); see *Butler* v. *United States*, 153 F. 2d 993, 994 (C.A. 10).

3. Petitioner contends, although without giving any supporting reasons, that the trial court's instruction on possession was erroneous (Pet. 3). There was only one real issue at trial—whether petitioner or someone else acquired the marihuana and placed it in petitioner's car. In his instructions, the trial judge told the jury that it must find beyond a reasonable doubt

that petitioner acquired the marihuana, and that petitioner's defense was that he had not acquired it (R. 95-96). Later, he instructed the jury that the statute reached "any transferee who has received", and that in this case if petitioner possessed the marihuana he also "received" it (R. 102).[3] The judge then gave the instruction quoted *supra*, p. 5, to the effect that possession meant the authority to deal with the marihuana as would an owner—the power to control its disposition.

Within the context of this case, and taken as a whole, the instruction was clearly correct. Cf. *Roviaro* v. *United States*, 353 U.S. 53, 63, fn. 14, and cases there cited. Moreover, petitioner, by fai'ing to object to the instruction before the jury retired, expressly waived his right to object to the instruction on appeal. Rule 30, F. R. Crim. P.; *McKenna* v. *United States*, 232 F. 2d 431, 438 (C.A. 8); *Estep* v. *United States*, 223 F. 2d 19, 22 (C.A. 5), certiorari denied, 350 U.S. 863.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] There was no evidence that someone else had received the marihuana for petitioner's benefit and at his request.

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